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SUPREME COURT, U.S.

No. 98-875

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DAVISTER CORPORATION,

Petitioner,

vs.

UNITED REPUBLIC LIFE INSURANCE COMPANY AND ROBERT E. WILCOX, UTAH INSURANCE COMMISSIONER AND LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Utah state law that grants exclusive jurisdiction to a Utah state court over all actions and proceedings against an insolvent insurance company reverse preempts the Federal Arbitration Act by the operation of the McCarran-Ferguson Act.

STATEMENT PURSUANT TO RULE 29.6

Professional Investors Insurance Group, Inc. is the parent company of Respondent United Republic Life Insurance Company; however, Professional Investors Insurance Group, Inc. is not the exclusive owner of United Republic Life Insurance Company shares. Other shareholders of United Republic Life Insurance Company include Petitioner Davister Corporation. United Funeral Services, Inc. is a nonwholly owned subsidiary of United Republic Life Insurance Company.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	1
A. Proceedings Before the District Court	1
B. The Decision of the United States Court of Appeals for the Tenth Circuit	3
Reasons for Denying the Writ	5
I. The Petition For A Writ Of Certiorari Should Be Denied Because There Is No Conflict Between The Tenth Circuit And The Decisions Of Other Circuits.	5
A. The Second, Tenth and Fifth Circuit Courts of Appeal Are Consistent with *Fabe*.	5
B. There is No Conflict With the First, Third, Eighth and Ninth Circuit Courts of Appeal and the Second, Fifth and Tenth Circuits.	7

Contents

Page

C. There Is No Conflict Between The Circuit Courts Of Appeal On The Impair, Invalidate And Supersede Prong In *Fabe*. 15

II. The Tenth Circuit Properly Decided This Case In Accordance With The Supreme Court's Reasoning In *Fabe*. 17

III. Abstention Was Appropriate Under The Facts Of This Case 20

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Barnett Bank v. Nelson, 517 U.S. 25 (1996) 19, 20

Bennett v. Liberty National Fire Insurance Co., 968 F.2d 969 (9th Cir. 1992) 10, 11, 12

Burford v. Sun Oil Co., 319 U.S. 315 (1943) ... 20, 21, 22, 23

Cochran v. Paco, 606 F.2d 460 (9th Cir. 1979) 15

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 20, 21

Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297 (8th Cir. 1997) 7, 8, 15, 16

Garcia v. Island Program Designer, 4 F.3d 57 (1st Cir. 1993) 8, 9

Garcia v. Island Program Designer, Inc., 875 F. Supp. 940 (D. Puerto Rico 1994), *aff'd, Garcia v. Island Program Designer, Inc.*, No. 95-1006, 1995 WL 469461 (1st Cir. 1995) 8, 9, 10

Garland v. Garland, 165 F.2d 131 (10th Cir. 1947) .. 21

Grode v. Mutual Fire, Marine and Inland Insurance Co., 8 F.3d 953 (3rd Cir. 1993) 11, 12, 13, 15, 16, 23

Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979) 19, 20

Cited Authorities

Page

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 22

Humana, Inc. v. Forsyth, __ U.S.__, 1999 WL 17679 (U.S. January 20, 1999) 6, 8, 15, 17, 18, 19, 20, 22

Kenty v. BankOne, Columbus, N.A., 92 F.3d 384 (6th Cir. 1996) 8, 14, 15, 16

Merchants Home Delivery Service, Inc. v. Frank B Hall & Co., Inc., 50 F.3d 1486 (9th Cir. 1995), *cert. denied, Prometheus Funding Corp. v. Merchants Home Delivery Service, Inc.*, 516 U.S. 964 (1995) 8, 14, 15

Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co., 801 F.2d 748 (5th Cir. 1986) 21

Munich-American Reinsurance Co. v. Crawford, 141 F.3d 585 (5th Cir. 1998), *cert. denied, American Reinsurance Co. v. NAC Reinsurance Corp. v. Crawford*, 67 U.S.L.W. 3361 U.S. (November 30, 1998) 4, 5, 6, 7

Murff v. Professional Medical Insurance Co., 97 F.3d 289 (8th Cir. 1996) 13, 15, 16

Nationwide Mutual Insurance Co. v. Cisneros, 52 F.3d 1351 (6th Cir. 1995) 16

New Orleans Public Service, Inc. v. Counsel of the City of New Orleans, 491 U.S. 350 (1989) 21

Cited Authorities

Page

Quackenbush v. Allstate Insurance Co., 517 U.S. 706 (1996) 19, 20, 21

Quackenbush v. Allstate Insurance Co., 121 F.3d 1372 (9th Cir. 1997) 10, 11, 12

Sabo v. Metropolitan Life Insurance Co., 137 F.3d 185 (3rd Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3024 (U.S. June 29, 1998) 8

Securities and Exchange Comm'n v. Nat'l Securities, Inc., 393 U.S. 453 (1969) 6

Stephens v. American Int'l Ins. Co., 66 F.3d 41 (2nd Cir. 1995) 7

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119 (1982) 14

United States v. Fabe, 508 U.S. 491 (1993) ..... *passim*

Villafane-Neriz v. FDIC, 75 F.3d 727 (1st Cir. 1996) 8

Younger v. Harris, 401 U.S. 37 (1971) 20, 21, 22

Cited Authorities

Page

Statutes:

18 U.S.C. § 1961, *et seq.* 7

Ky. Rev. Stat. Ann. § 304.33-010(6) (Banks-Baldwin 1996) 7

Utah Code Ann. § 31A-5-305 (1998) 1, 2

Utah Code Ann. §§ 31A-27-101, *et seq.* (1998) 22

APPENDIX

	Page
Appendix A — Relevant Statute	1a
Appendix B — Letter Of The State Of Utah Insurance Department Dated March 23, 1993	2a
Appendix C — Unpublished Opinion Of The United States Court Of Appeals For The First Circuit Dated August 9, 1995	4a
Appendix D — Petition For Order Compelling Arbitration And Stay Dated November 7, 1995	7a

Respondent respectfully requests that the Court deny the petition for a writ of certiorari ("Petition") to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The United States District Court for the District of Utah entered an Order dated January 4, 1996, abstaining from compelling arbitration. (Pet. App. B.) The United States District Court for the District of Utah entered an Order dated February 16, 1996 dismissing without prejudice the Petition for Order Compelling Arbitration and Stay. (Pet. App. C.) The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 152 F.3d 1277. (Pet. App. A.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those listed by Petitioner, the following statutes are involved in this case. Utah Code Ann. § 31A-5-305 (1998). These statutes are set forth in full in Respondents' Appendix, attached hereto. References to Respondents' Appendix shall be in the form, "Resp. App. __."

STATEMENT OF THE CASE

A. Proceedings Before the District Court

In December of 1992, Respondent, United Republic Life Insurance Company ("United Republic") purchased from Petitioner, Davister Corporation ("Davister"), all of the outstanding and issued shares of R.G. Acquisition Corporation ("RGA") which were exclusively owned by Davister. Pursuant to the Stock Purchase Agreement dated December 23, 1992

("Stock Purchase Agreement"), United Republic agreed to transfer 3,027,000 shares of United Republic Series B stock to Davister in exchange for the total ownership of all RGA stock.

The issuance of the Series B stock of United Republic to Davister was not approved by the Utah Insurance Department as required by Utah Code Ann. § 31A-5-305 (1998). (Resp. App. A.) On March 23, 1993, the Utah Insurance Department informed United Republic that its failure to obtain the approval of the Utah Insurance Department for the issuance of stock and debentures (including the stock involved in the RGA transaction) would necessitate the reversal of the transactions and the accounting for those transactions until approval for the stock issuance had been granted. (Resp. App. B.)

On September 29, 1993, Respondent, Robert E. Wilcox ("Wilcox") filed the Verified Petition for Seizure Order with the Utah state district court seeking permission to take control and possession of all United Republic property. On September 29, 1993, the Utah state district court granted Respondent Wilcox's petition thereby giving him possession and control of all United Republic property.

On March 29, 1994, Respondent Wilcox filed an Original Petition and Application for Injunctive Relief in the Texas state court (the "Texas Action"), seeking to gain control of the properties located in Texas. Davister intervened in the Texas Action on April 14, 1994, seeking the rescission of the Stock Purchase Agreement on the basis that the unapproved stock and debentures issued by United Republic constituted a failure of consideration that rendered the transactions void. More specifically, Davister's argument called into question the effect of the Utah Insurance Department regulation of stock issued by insurance companies.

On April 18, 1994, Respondent Wilcox filed in the Utah state court a Verified Petition for Liquidation Order ("Liquidation Petition") which stayed all actions against United Republic including Davister's claims for rescission in the Texas Action. On November 18, 1994, the Utah state court entered a Liquidation Order that provided, *inter alia*, that all actions against United Republic were stayed indefinitely, and appointed Respondent Wilcox the Liquidator of United Republic. On July 24, 1995, Davister filed a Proof of Claim against the liquidation estate of United Republic wherein Davister once again sought rescission of the Stock Purchase Agreement.

Almost one year after the entry of the Liquidation Order, Davister filed its Petition for Order Compelling Arbitration and Stay in the United States District Court for the District of Utah seeking to enforce an arbitration provision in the Stock Purchase Agreement. The district court declined to order arbitration and abstained from taking jurisdiction of the dispute. (Pet. App. B.) Subsequently, the district court entered its Order dated February 16, 1996, dismissing the dispute without prejudice. (Pet. App. C.) Rather than requesting the Utah state court in charge of United Republic's liquidation proceedings to compel arbitration, Davister chose to appeal to the United States Court of Appeals for the Tenth Circuit.

B. The Decision of the United States Court of Appeals for the Tenth Circuit

Applying the three-part test set forth by this Court in *United States v. Fabe*, 508 U.S. 491 (1993), the Tenth Circuit upheld the Utah federal district court's decision not to compel arbitration of the dispute between Davister and United Republic. The Tenth Circuit began by stating that its decision must be guided by the McCarran-Ferguson Act, not by doctrines of abstention. The Tenth Circuit faithfully applied this Court's

reasoning in *Fabe* and considered if the FAA "must give way to a state court blanket stay in the liquidation setting" in light of the McCarran-Ferguson Act. (Pet. App. A at 7a.) The Tenth Circuit found guidance in the Fifth Circuit's decision in *Munich-American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998). In *Munich-American*, the Fifth Circuit held that state laws granting exclusive jurisdiction to state courts in insurance insolvency matters were laws clearly enacted for the purpose of regulating the business of insurance. *See id.* at 592-93.

The Tenth Circuit stated that the logic of *Munich-American* should apply to the facts before it and that Utah's statutory provisions that stay all actions and proceedings against the insurer in Utah or elsewhere reverse preempt the FAA under *Fabe*. (Pet. App. A at 7a.)

> Because the stay prevents conflicting rulings on claims, the unequal treatment of claimants, and the unnecessary and wasteful dissipation of the remaining funds of the insolvent insurer, the stay manifests a purpose of protecting policyholders.

(Pet. App. A at 10a.)

The majority focused on the state statute itself, not on the underlying dispute brought by the litigants. In closing, the Tenth Circuit noted that Davister would still have a remedy in the Utah state liquidation court because that court could easily order arbitration or allow the stay to be lifted with respect to the Texas Action. (Pet. App. A at 12a.)

In the dissenting opinion, Judge Lucero asserted that the majority opinion had created "a per se rule of reverse preemption of federal enforcement of all arbitration agreements" in an insolvency proceeding in state court. (Pet. App. A at 14a.)

Specifically, the dissent argued that the majority incorrectly used the second prong of the *Fabe* test, *i.e.*, was the state statute enacted for the purpose of regulating the business of insurance. Judge Lucero stated that the dispute between Davister and United Republic concerned a real estate contract that had no connection to policyholders or their policies. (Pet. App. A at 15a.) Finally, Judge Lucero stated that the federal statute compelling arbitration would not conflict with the Utah liquidation court stay provisions because "Utah has no state law, either within or outside of its insurance liquidation scheme, mandating against arbitration in the insurance context." (Pet. App. A at 15a.)

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE TENTH CIRCUIT AND THE DECISIONS OF OTHER CIRCUITS.

A. The Second, Tenth and Fifth Circuit Courts of Appeal Are Consistent with *Fabe*.

There is no compelling reason to grant the petition for writ of certiorari. The Court considered and denied a similar petition for writ of certiorari on virtually the same question in a case involving similar facts, statutes, and arguments as the instant case earlier this term. *See Munich-American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *cert. denied, American Reinsurance Co. v. NAC Reinsurance Corp. v. Crawford*, 67 U.S.L.W. 3361 U.S. (November 30, 1998).

In *Munich-American*, a creditor-reinsurer sued the liquidator of an insolvent insurance company over the payment of money.

See 141 F.3d at 587. The creditor-reinsurer, relying on the FAA, sought to enforce an arbitration provision in a contract with Employer's National Insurance Company ("ENIC"). *See id.* The Oklahoma Insurance Commissioner and liquidator of ENIC would not submit to arbitration. *See id.*

The Fifth Circuit upheld the dismissal of petitioner's motion to compel arbitration holding that the state insurance liquidation act reverse preempted the FAA. *See id.* In a careful and judicious application of the principles set forth in *Fabe* and in *Securities and Exchange Comm'n v. Nat'l Securities, Inc.*, 393 U.S. 453, 460 (1969), the Fifth Circuit held that the state insurance regulations at issue were enacted for the purpose of regulating the "business of insurance." *Munich-American*, 141 F.3d at 594. These state law provisions consolidated all claims against the limited assets of the insolvent insurer in one court and prevented the waste of estate funds that necessarily would occur if the liquidator was forced to defend different suits brought by different claimants in different forums across the county. *See id.* at 593-94. The stay provisions also eliminated the risk of piecemeal litigation and the unequal treatment of claims. *See id.* at 592-93. The court held that statutes that: (i) granted the state court exclusive original jurisdiction of insurance company liquidation proceedings; and (ii) allowed the state court to issue injunctions to enforce its exclusive jurisdiction, were "reasonably necessary" to advance the goal of protecting policyholders. *See id.* at 592-94.[1]

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1. The Fifth Circuit also properly applied *Fabe* on the issue of the meaning of "invalidate, impair, and supersede." Holding that the state's insurance liquidation law granted the state court broad powers to prevent interference with the liquidator including the power to enjoin any proceeding interfering with the liquidator's delinquency proceedings. *Munich-American*, 141 F.3d at 595-96. However, the proper interpretation of this prong was resolved in this Court's recent decision in *Humana, Inc. v. Forsyth*, __ U.S.__, 1999 WL 17679 (U.S. January 20, 1999).

As stated earlier, the creditor-reinsurer in *Munich-American* filed a petition for a writ of certiorari with this Court which was denied. Petitioner herein has asserted virtually the same issue and alleged the same conflicts as did the petitioner in *Munich-American*. In light of this, the instant Petition should also be denied.

B. There is No Conflict With the First, Third, Eighth and Ninth Circuit Courts of Appeal and the Second, Fifth and Tenth Circuits.

There is no conflict among the circuit courts of appeal raised by the decision of this case. The alleged conflicts actually turn on questions of fact or *dicta* that effectively distinguish one court's analysis from another's, not on different interpretations of the same law applied in the same factual setting.[2] Indeed, closer analysis of the alleged conflicts reveals that the circuit courts of appeal have uniformly recognized that under similar facts they would reach conclusions similar to the Tenth Circuit's in *Davister*.[3]

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2. In *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995), the Second Circuit held that the FAA could not be used to compel arbitration of a suit against reinsurers. However, unlike the other cases, the state statute at issue in *Stephens* contained an express anti-arbitration provision. This state law provision has been repealed by Kentucky (*Ky. Rev. Stat. Ann.* § 304.33-010(6) (Banks-Baldwin 1996)) thereby resolving the *Stephens* question. As a result, *Stephens* has limited applicability in the present case because the Second Circuit has not ruled in the context of a state insurance liquidation law that does not include an express anti-arbitration clause.

3. Petitioner cites to conflicts in the following cases that involve the McCarran-Ferguson Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*: *Doe v. Norwest*

(Cont'd)

Petitioner cites to *Garcia v. Island Program Designer*, 4 F.3d 57 (1st Cir. 1993) ("*Garcia I*"), for the proposition that the First Circuit conflicts with the Tenth Circuit's interpretation of the "business of insurance" discussion in *Davister*. (Pet. at 11.) Petitioner's reliance on *Garcia I* is misplaced. *See Garcia v. Island Program Designer, Inc.*, 875 F. Supp. 940 (D. Puerto Rico 1994) ("*Garcia II*"), *aff'd*, *Garcia v. Island Program Designer, Inc.*, No. 95-1006, 1995 WL 469461, at *1 (1st Cir. 1995) (unpublished) ("*Garcia III*") (Resp. App. C.) First, the *Garcia* cases do not involve the FAA. Second, those cases involved an insolvent health maintenance organization ("HMO"), not an insolvent insurance company, an important distinction expressly acknowledged by the district court on remand in *Garcia II*.[4] Accordingly, contrary to Petitioner's assertions, the First Circuit has not rendered a ruling on the same matter, facts or the statutes at issue in the Petition.

(Cont'd)

Bank Minnesota, N.A., 107 F.3d 1297 (8th Cir. 1997); *Kenty v. BankOne, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996); *Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996); and *Merchants Home Delivery Service, Inc. v. Frank B Hall & Co., Inc.*, 50 F.3d 1486 (9th Cir. 1995), *cert. denied, Prometheus Funding Corp. v. Merchants Home Delivery Service, Inc.*, 516 U.S. 964 (1995). These conflicts were resolved by this Court in *Humana, Inc. v. Forsyth*, argued before the Court on November 30, 1998, and decided by this Court on January 20, 1999. *Humana*, 1999 WL 17679, at *7. A similar petition to that filed in *Humana* also was submitted on June 29, 1998, in a case extensively relied upon by Petitioner called *Sabo v. Metropolitan Life Insurance Co.*, 137 F.3d 185, 193 (3rd Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3024 (U.S. June 29, 1998). In light of this Court's decision in *Humana* which resolves the conflicts discussed in the Petition, and in light of the pending petition before this Court in *Sabo*, it is not necessary for this Court to grant the Petition.

4. Petitioner concedes in footnote 6 of their Petition that *Garcia* did not involve the FAA. (Pet. at n.6.) Thus, *Garcia I* is not persuasive authority in the instant case.

The *Garcia* line of cases involved appeals of the district court's decision with respect to two separate preemption issues. In *Garcia I*, the First Circuit considered whether the McCarran-Ferguson Act applied to a dispute between the Internal Revenue Service ("IRS") and the liquidator of an insolvent HMO or whether ordinary federal preemption principles applied. *See* 4 F.3d at 57. The insurance liquidator argued that the federal statute giving the IRS's late-filed claim a first priority was reverse preempted by a Puerto Rican insurance company liquidation statute's filing-deadline provision. *See id.* at 58-62. Applying *Fabe*, the First Circuit held that the McCarran-Ferguson Act did not apply to the case before it because a filing deadline provision was deemed unnecessary for a liquidation and thus, was not "reasonably necessary to further the goal of protecting policyholders." *Garcia I*, 4 F.3d at 61-62. The Court reasoned that without such a filing deadline, liquidation would still occur. The court then applied ordinary preemption principles. *See id.* at 62.

On remand, the liquidator next argued that the McCarran-Ferguson Act reverse preempted the federal priority statutes for the claims of health care providers in the liquidation of an HMO. *See Garcia II*, 875 F. Supp. at 942. Citing *Fabe*, the liquidator argued that the state's priority scheme "involve[d] the regulation of the business of insurance and [was] designed to regulate, protect, or advance the interests of policyholders." *Garcia II*, 875 F. Supp. at 942-43. The district court disagreed, holding that the

> claims of health care providers in the liquidation of an HMO are [not] sufficiently like those of policyholders in the liquidation of an insurance company. . . . The relationship between an insurance company and an insured is not equal to the

> relationship between an insurance company and a health care provider.

Id. at 944.

On appeal for the second time, the liquidator asked the First Circuit to reverse the district court's ruling that the McCarran-Ferguson Act was not applicable to cases involving HMOs. *Garcia III*, 1995 WL 469461, at *1. The First Circuit refused to do so. *See id.* Thus, the conflict asserted by Petitioner is nonexistent.

Petitioner also discussed the alleged conflict with the Ninth Circuit's ruling in the pre-*Fabe* case of *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992). In *Bennett*, an insurance liquidator sought to enforce contractual rights against a creditor under a reinsurance agreement. *See id.* at 970. Petitioner is correct that the Ninth Circuit did enforce the arbitration clause invoked by the creditor under the FAA. *See id.* at 971. However, the *Bennett* court recognized that its decision to require arbitration was contrary to the decision reached by the Sixth Circuit Court of Appeals in *Fabe*, and that certiorari had been granted in that case. *See Bennett*, 968 F.2d at 973. Given that the court of appeal's ruling in *Fabe* was later upheld in relevant part by this Court, no actual conflict could exist unless and until the Ninth Circuit reconsiders *Bennett* in light of *Fabe*.

Reliance on any alleged conflict in *Bennett* also is misplaced in light of the recent Ninth Circuit case, *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372 (9th Cir. 1997) ("*Quackenbush II*").[5] In *Quackenbush II*, a state insurance

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5. Petitioner has failed to cite the Ninth Circuit's ruling in *Quackenbush II* in its Petition.

liquidator of an insolvent insurance company, Mission Insurance Company, sought to enforce his contractual rights to recover payments under a reinsurance agreement Mission had with a creditor, Allstate Insurance Company. Allstate sought to invoke a contractual arbitration provision under the FAA.[6] *See id.* at 1375-76.

While ultimately holding that the liquidator's suit against the reinsurer-creditor was subject to the FAA (under facts similar to those in *Bennett*), the Ninth Circuit expressly distinguished its holding from cases involving suits by a creditor against the liquidator as in the *Davister* case. The Ninth Circuit made it clear that in circumstances involving a suit by a creditor against an insurance liquidator, it would hold that the McCarran-Ferguson Act would preempt the FAA. The Ninth Circuit stated:

> Under *Fabe*, there is no question that California's insurer-insolvency provisions regulate the "business of insurance" and are saved from preemption by the McCarran-Ferguson Act. *Thus, Allstate could not invoke the FAA to compel arbitration of its claims against Mission, which must be pursued through California's statutory insolvency scheme.*

Quackenbush II, 121 F.3d at 1381 (emphasis added). Thus, the Ninth Circuit stated in clear and unquestionable terms that it would hold in accord with the reasoning of the Tenth Circuit court under facts similar to those in the *Davister* case.

Petitioner's reliance on the Third Circuit's decision in *Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 8 F.3d

6. The *Quackenbush II* court also considered the additional issue of whether a district court is prohibited from enjoining a state court litigation under the Anti-Injunction Act. *Quackenbush II*, 121 F.3d at 1376-1379.

953 (3rd Cir. 1993), also is misplaced. As in *Bennett* and *Quackenbush II*, an insurance liquidator brought an action against reinsurers based on a reinsurance contract. *See Grode*, 8 F.3d at 955. While *Grode* is at its core an abstention case, the liquidator argued that the court should also look to the McCarran-Ferguson Act. *See id.* at 958. The court expressly stated that the issue before it was "simply whether the district court improperly surrendered federal jurisdiction" and that it would not determine whether arbitration should have been compelled under the FAA. *Id.* at 955. The court's cursory discussion of the McCarran-Ferguson Act is dicta, which stated that the McCarran-Ferguson Act was "totally irrelevant," because this Court's ruling in *Fabe* was fundamentally inapplicable to the issues and facts before the *Grode* court. *Id.* at 960. The court stated that

> [i]n the instant case, however, there is no issue as to priority of any claim in the distribution of Mutual's assets or as to whether Pennsylvania's statute regulates the insurance industry.

Id.

Moreover, in *Grode* the Third Circuit also recognized that its analysis of the case before it would be different if it involved a suit by a creditor against the insurance liquidator. *See id.* at 959-60. The court expressly recognized that the state's interest in an orderly liquidation of assets in a single liquidation forum would be different in a suit by a creditor against the liquidator. It stated:

> In other words, courts abstain in suits against insolvent insurance companies for the same reasons that district courts refer bankruptcy cases to the bankruptcy court: Insurance companies tend to issue identical policies to a large number of people,

> rendering a single forum necessary to dispose equitably of the company's limited assets so as to avoid a race to the courthouse.
>
> The insolvent insurance company, Mutual Fire, is the plaintiff, not the defendant. As a result, there is not a large number of similarly situated plaintiffs competing for a limited amount of money. The insolvent insurer in liquidation is not called upon to dissipate its funds *defending* unconnected suits across the country. Rather, the insurance company is the only plaintiff and the defendants are not insolvent. Thus, this case is distinguishable from those in which the insolvent insurance company is the defendant, and there is no important state interest here involved to warrant abstention.

Id. at 960 (internal citations omitted). Thus, *Grode* does not support Petitioner's assertions.

Another case cited in the Petition — but for a different proposition — also supports the Tenth and Fifth Circuit's application of the "business of insurance" prong of *Fabe*. The Eighth Circuit in *Murff v. Professional Medical Insurance Co.*, 97 F.3d 289 (8th Cir. 1996), found that the provision staying all actions against an insolvent insurance company in a state insurance company insolvency act was enacted for the purpose of regulating the "business of insurance." *See id.* at 291. The *Murff* court stated that such a statute

> protects policyholders because it preserves the assets of the insolvent insurer's estate, thereby enhancing the ability of an insolvent insurance company to perform its contractual obligations.

Id.

Petitioner further contends that there are conflicts between the circuit courts on the question of the "business of insurance" prong set forth in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982). Arguably, a few courts have noted a willingness to examine the conduct of the parties but ultimately these courts apply the same three-step *Pireno* test as did the Tenth Circuit.

For example, the Sixth Circuit's ruling in *Kenty v. BankOne, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996), a RICO case, is not in conflict with the three-prong test applied by other courts. In *Kenty*, the court's language regarding conduct is a mere statement of the nature of the analysis undertaken by the court. The court specifically stated:

> [T]he initial questions here are (1) whether the conduct by the insurance company in this case constitutes the business of insurance, and (2) whether it is regulated by Ohio insurance law. In *Union Labor Life Ins. Co. v. Pireno* . . . the Supreme Court set out *three factors* that determine when a company is engaging in the business of insurance for the purposes of the McCarran-Ferguson Act to apply: the practice must (1) have the effect of transferring or spreading a policyholder's risk; (2) be an integral part of the policy relationship between the insurer and the insured; and (3) be limited to entities within the insurance industry.

Id. at 391 (emphasis added) (internal citation omitted). The court then proceeded to apply the three factors as set forth in *Pireno* without reliance on a fourth "conduct" based test as asserted by Petitioner. *See id.*

Finally, the Ninth Circuit in *Merchants Home Delivery Service, Inc. v. Frank B Hall & Co., Inc.*, 50 F.3d 1486 (9th

Cir. 1995), another RICO case, relied on a McCarran-Ferguson Act test set forth in a pre-*Fabe* case, *Cochran v. Paco*, 606 F.2d 460, 464 (9th Cir. 1979). *Cochran* applied none of the *Pireno* factors adopted by this Court in *Fabe*. Moreover, its reasoning is not based on this Court's precedents in *Fabe* or *Pireno*. In sum, there are no conflicts among the circuits on the same matter, and therefore, the Petition should be denied.

C. There Is No Conflict Between The Circuit Courts Of Appeal On The Impair, Invalidate And Supersede Prong In *Fabe*.

Petitioner's argument that there is a conflict between the circuit courts of appeal on the "impair, invalidate, and supersede" clause of *Fabe* is unpersuasive for two reasons. First, this Court has set forth a new formulation for this prong of the *Fabe* test in *Humana v. Forsyth*, 1999 WL 17679, at *7. In light of this decision, any conflicts on this prong of the *Fabe* test have been resolved.[7]

Second, the alleged conflicts in *Grode* and *Murff* are illusory. Petitioner's argument that *Grode* stands for the proposition that "the First [sic] Circuit held that arbitration would have 'no negative effect on the state's regulatory scheme' " relies on the court's abstention analysis, not the McCarran-Ferguson Act.[8] (Pet. at 14.) Moreover, as noted

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7. As noted above, the RICO cases cited by Petitioner as evidence of conflicts on the proper interpretation of this prong of the *Fabe* test were resolved by this Court in the *Humana* decision.

8. Petitioner misstates the holdings of *Kenty v. BankOne, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996), and *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997). (*See* Pet. at 15.) Contrary to Petitioner's arguments, these cases do not stand for the proposition that there is a conflict on whether the impairment analysis under the

(Cont'd)

above, the Third Circuit in *Grode* expressly acknowledged that the McCarran-Ferguson Act was inapplicable to the facts and issues before it and that its reasoning would change in a case involving a suit by a liquidator against a creditor. *See Grode*, 8 F.3d at 960. Similarly, *Murff* does not discuss the FAA but the Age Discrimination in Employment Act. Thus, there is no conflict with the Tenth and Fifth Circuits.

(Cont'd)

McCarran-Ferguson Act applies only to substantive provisions of state law but not to procedural provisions. (Pet. at 8 and 15.) Petitioner misquotes the statement and reasoning of the *Kenty* court. (Pet. at 15.) The complete quotation of the *Kenty* court is:

> [*Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995)] stands for the proposition that McCarran-Ferguson protects the substantive measures embodied in state law. A party seeking to invoke McCarran-Ferguson *cannot simply point to additional procedural measures included in a federal law without identifying some substantive aspect of the state law that is being invalidated, impaired or superseded.* Thus, as the plain language of the statute suggests, this is fundamentally a question of what effect RICO has on the state law.
>
> In this case, Transamerica has pointed to several substantive sections of the Ohio Revised Code that would be either impaired or superseded by application of RICO.

Kenty, 92 F.3d at 392 (emphasis added) (internal citation omitted). Thus, the *Kenty* case neither limits the McCarran-Ferguson Act to substantive provisions of state law nor requires a party seeking McCarran-Ferguson Act preemption to identify a **substantive** (but not a procedural) provision of **state law** that will be impaired, invalidated or superseded as argued by Petitioner. Instead, *Kenty* simply states that a party cannot cite to procedural measures in **federal law** in an effort to argue impairment without specifically identifying state law provisions that will be impaired. Similarly, the Eighth Circuit in *Doe* does not make the procedural versus substantive distinction. *Doe*, 107 F.3d at 1297.

II.

THE TENTH CIRCUIT PROPERLY DECIDED THIS CASE IN ACCORDANCE WITH THE SUPREME COURT'S REASONING IN *FABE*.

The Tenth Circuit's decision in *Davister* is consistent with this Court's reasoning in *Fabe*. *Fabe* sets forth a three-part test for determining if the McCarran-Ferguson Act should be applied: (1) does the federal statute at issue [*i.e.*, the FAA] "specifically relate to the business of insurance"; (2) was the state statute enacted "for the purpose of regulating the business of insurance"; (3) would application of the federal statute "impair, invalidate, or supersede" the state statute. *See Fabe*, 508 U.S. at 500-01; *Humana*, 1999 WL 17679 at *7.

With respect to the second criterion,[9] the Tenth Circuit cited *Fabe* for its conclusion that "the actual performance of an insurance contract is an essential part of the business of insurance." *Fabe*, 508 U.S. at 503-05.

> The primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies.

Id. at 505.

The Tenth Circuit emphasized that its interpretation of *Fabe* did not mean that all actions arising under a state insurance liquidation statute would automatically fall under the reverse preemption of the McCarran-Ferguson Act. Rather, the potential impact of the McCarran-Ferguson Act should be determined

9. The first part of the test is satisfied because the FAA does not specifically relate to the business of insurance.

by a case-by-case analysis of the precise statutes involved.[10] (Pet. App. A at 7a.)

The Tenth Circuit's reasoning does not conflict with *Fabe*'s assessment of state insurance insolvency laws enacted for the purpose of regulating the business of insurance which reverse preempt federal law. A state insurance insolvency law affects the "business of insurance" to the extent the statute regulates policyholders. *See Fabe*, 508 U.S. at 508. The consolidation of all legal proceedings in an exclusive state court directly affects policyholders by providing a centralized forum in which the policyholders' claims will be adjudicated. The mere fact that the Utah statute affects other creditors (by requiring creditors' claims to be brought before the same state court) does not diminish or denigrate the direct impact on policyholders. This impact on policyholders is not remote, attenuated or derivative. Unquestionably, the *Davister* opinion comports with the standards announced by this Court in deciding whether the statute regulates the business of insurance.

With respect to the third criterion of *Fabe*, the Tenth Circuit decided that arbitration in a court other than the state liquidation court would "impair the progress of the orderly resolution of all matters involving the insolvent company." (Pet. App. A at 11a.) Although the *Davister* opinion was written before this Court's *Humana* decision, the Tenth Circuit's ruling is in total agreement with the *Humana* test to determine if a federal law would "impair" the state statute. When a federal law would frustrate any declared state policy or interfere with a state's administrative regime, the

10. *Fabe* does not mandate an inquiry into the underlying dispute; but if it did, Judge Lucero should have examined the essential dispute between Davister and United Republic which involved the effect of United Republic not having its stock approved by the Utah Insurance Department. Certainly, the Utah Insurance Department's regulation of stock issued by insurance companies is a statutory scheme enacted to regulate the business of insurance.

McCarran-Ferguson Act precludes the application of the federal law. *Humana*, 1999 WL 17679, at *6. The Tenth Circuit focused on the disruption that the FAA would have on the Utah administrative regime when it ruled that the FAA would impair the state insurance insolvency scheme:

> Allowing a putative creditor to pluck from the entire liquidation proceeding one discrete issue and force arbitration contrary to the blanket stay entered by the Utah state court would certainly impair the progress of the orderly resolution of all matters involving the insolvent company.

(Pet App. A at 11a.) Therefore, the Tenth Circuit decision is fully compatible with the most recent decision of this Court concerning the third component of the *Fabe* test.

The Tenth Circuit's application of the McCarran-Ferguson Act also does not improperly abrogate the FAA as shown by the past precedents of this Court and the legislative history of the McCarran-Ferguson Act. The McCarran-Ferguson Act was described as a means of "restor[ing] the supremacy of the States in the realm of insurance regulation." *Fabe*, 508 U.S. at 499-500; *see also Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996) (the McCarran-Ferguson Act is "to protect state [insurance regulation]. . . . against inadvertent federal intrusion.").[11] "The starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *Fabe*, 508 U.S. at 500 (citing *Group Life & Health Insurance Co. v.*

11. The Supreme Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), does not support Petitioner's argument. Petitioner's reliance on citations from petitioner's brief in *Quackenbush* is not binding authority. (Pet. at 23.) Additionally, the Supreme Court in *Quackenbush* did not address the McCarran-Ferguson Act in the decision.

Royal Drug Co., 440 U.S. 205, 210 (1979)). Looking at the language of the McCarran-Ferguson Act the relevant inquiry is does the FAA "specifically relate to the business of insurance"? Clearly, it does not. Additionally, application of the FAA would frustrate the Utah state policy of staying all actions and proceedings against an insolvent insurance company, and interfere with Utah's administrative insurance regime of administering all insurance company liquidations in one forum. *See Humana,* 1999 WL 17679, *7. The Tenth Circuit's decision in the instant case was in complete conformity with the McCarran-Ferguson Act as well as the reasoning of this Court in cases such as *Fabe, Barnett* and *Humana*. Accordingly, the Petition should be denied.

III.

ABSTENTION WAS APPROPRIATE UNDER THE FACTS OF THIS CASE.

Petitioner was not improperly "put out of court" by the rulings of the Utah district court. The crux of Petitioner's argument is that a case involving an insolvent insurance company and the McCarran-Ferguson Act does not involve any of the important state interests that mandate abstention under any of the abstention doctrines. This argument is unpersuasive.

In its most recent discussion of the vitality and scope of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), this Court stated that while federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress this duty is not, however, absolute." *Quackenbush v. Allstate*, 517 U.S. 706, 716 (1996) (*citing Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)).[12]

12. *Colorado River* also discusses two other abstention doctrines adopted by this Court. Under the abstention doctrine adopted in *Younger*

(Cont'd)

Quackenbush also reaffirmed the holding in *New Orleans Public Service, Inc. v. Counsel of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). *NOPSI* held that *Burford* abstention would enable a federal court to abstain from hearing a case and to dismiss the case if adjudication in a federal court " 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Quackenbush*, 517 U.S. at 726-27 (quoting *NOPSI*, 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814)). Finally, *Quackenbush* held that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush*, 517 U.S. at 731.[13]

(Cont'd)

v. Harris, 401 U.S. 37, 41 (1971), the court will abstain if: (1) the federal court will interfere with ongoing state proceedings of a judicial nature; (2) the ongoing state proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges. The other abstention doctrine may be applied "when considerations of wise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation . . . require abstention."

13. The underlying dispute before the federal court was not a simple contract action as asserted by Petitioner but a petition for an order compelling arbitration. (Resp. App. D.) Petitioner has never sought money damages but instead has sought equitable relief in the form of rescission or specific performance of the contract. (Resp. App. D.) Petitioner sought equitable relief in this case because a petition under section 4 of the FAA "is a request that the court compel specific performance of an agreement to arbitrate." *Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 750 (5th Cir. 1986); *see also Garland v. Garland*, 165 F.2d 131, 133 (10th Cir. 1947) (a grant of specific performance is a grant of equitable relief). Thus, *Burford* abstention is appropriate in this case.

As discussed in *Humana*, the McCarran-Ferguson Act was enacted to preclude the application of federal laws in the face of state laws enacted for the purpose of regulating the business of insurance. 1999 WL 17679, at *5. Under the *Burford* abstention doctrine, any order compelling arbitration would disrupt the insurance liquidation proceedings, interfere with Utah's express and exclusive authority to regulate the insurance business, and interfere with ongoing state proceedings of a judicial nature.

As evidenced by the comprehensive scheme set forth in Utah Code Ann. §§ 31A-27-101 through 411, Utah has a strong interest in the orderly liquidation of insolvent insurers and the orderly resolution of the claims against insolvent insurers such as United Republic. The comprehensive scheme requires that all claims be heard in one, exclusive state court proceeding. Had it not abstained, the district court in this case would have impinged upon important policy considerations and the express preeminence of state law under the McCarran-Ferguson Act by disrupting the orderly liquidation proceedings already underway in state court.

Timely and adequate state review is also available both in the Utah state court and in the Texas Action. The Utah state courts are capable of deciding the arbitrability of the RGA Stock Purchase Agreement without prejudice to Davister's alleged arbitration rights. Petitioner's contention that, by abstaining, the federal courts deprived Petitioner of a forum free of state court bias is unpersuasive. This Court has recognized state court bias as an exception to abstention only in the context of *Younger* abstention. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (exception to *Younger* abstention is where "state proceeding is motivated by a desire to harass or is conducted in bad faith"). Petitioner asserts that *Younger* abstention "is of little import [in this case]." Additionally, there is nothing in

the record before the Tenth Circuit Court of Appeals or this Court that remotely suggests that the state liquidation court is biased.

Finally, Petitioner's reliance on *Grode* is misplaced. Third Circuit law as set forth in *Grode* directly contradicts Davister's argument because the *Grode* court expressly recognized that abstention *is mandated* in a suit *against* an insolvent insurer. *See* 8 F.3d at 959. The court acknowledged in suits where the company is the defendant and there are large numbers of similarly situated plaintiffs competing for limited assets, then a single forum is necessary to prevent the dissipation of funds defending different suits in different forums. *See id.* at 960.

Therefore, the *Burford* abstention doctrine (as well as the other abstention doctrines recognized by this Court) applies. Davister was no improperly put out of court, and thus, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE

U.C.A. 1953 § 31A-27-305

31A-27-305 Actions by and against rehabilitator.

(1) The order for rehabilitation under Section 31A-27-303 automatically stays any action or proceeding in this state in which the insurer is a party or is obligated to defend a party. The stay continues until the rehabilitator obtains proper representation and prepares for further proceedings. The court that entered the rehabilitation order shall order the rehabilitator to take that action respecting pending litigation and other proceedings as the court considers necessary in the interests of justice and for the protection of creditors, policyholders, and the public. The rehabilitator shall immediately evaluate all litigation or other proceedings pending outside this state and shall petition the courts or agencies having jurisdiction over that litigation or those proceedings for stays whenever the rehabilitator determines it necessary to protect the estate of the insurer.

(2) No statute of limitations runs and no defense of laches arises with respect to any action by or against an insurer between the filing of a petition for rehabilitation against an insurer and the denial of the petition or an order of rehabilitation. Any action by the insurer that might have been commenced when the petition was filed may be commenced by the insurer or rehabilitator for at least 60 days after the order of rehabilitation is entered or the petition is denied, or for a longer period if ordered by the court. This subsection does not limit the powers of the rehabilitator to bring actions under Sections 31A-27-319, 31A-27-320, 31A-27-321, 31A-27-322, and other provisions of this chapter.

* * * *

APPENDIX B — LETTER OF THE STATE OF UTAH INSURANCE DEPARTMENT DATED MARCH 23, 1993

State of Utah
INSURANCE DEPARTMENT

* * *

March 23, 1993

Joseph Darrell Jordan, President
United Republic Life Insurance Company
215 South State Street, Suite 775
Salt Lake City, Utah 84111

Re: Surplus Debentures and Capital Stock Issues Reported in 1992 Annual Statement

The Utah Insurance Department has reviewed the 1992 annual statement of United Republic Life Insurance Company (the "Company") and is in the process of an ongoing examination of the Company. That examination and review have disclosed an issue of critical importance. The Company has not complied with the provisions of the Utah Code regarding prior approval for the issuance of surplus debentures and capital stock. The Company's annual statement reflects transactions in which real estate and stock have been acquired by the issuance of surplus debentures that subsequently were redeemed by the issuance of Series B stock or by the direct issuance of Series B. stock.

These transactions did not have the prior written approval of the Department as required by Section 31A-5-305 and/or were not issued under a solicitation permit as required by Section 31A-5-206. These transactions must be reversed until

Appendix B

such time as the Company has complied with these requirements. The assets acquired and the outstanding capital stock issued by the Company as reported in its 1992 annual statement are as follows:

Greenbrook/Brooklane real estate	$3,544,000
Chrysler Technology real estate	3,027,000
Security Park B real estate	836,000
Twin Oaks I & II real estate	2,400,000
Medical Resource Companies of America stock	600,000
TOTAL	$10,407,000

An alternative to the reversal of the transactions may be for the Company to establish an escrow liability for the assets received pending the required approvals. Either action would appear to place the Company in a hazardous condition. We therefore request that the Company not issue any new policies or enter into any new reinsurance treaties until such time as approval is given for these transactions and their appropriateness confirmed.

We request your reply to this letter not later than March 30, 1993.

Sincerely,

Robert E. Wilcox, ASA, FCA, MAAA
Insurance Commissioner

s/ Billy N. Lovelady, CFE, CIE
Chief Examiner

cc: Commissioner Robert E. Wilcox

APPENDIX C — UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AUGUST 9, 1995

Juna Antonio GARCIA, Insurance Commissioner, Etc., Plaintiff-Appellant,

v.

ISLAND PROGRAM DESIGNER, INC., Defendant, Appellee. United States of America, Intervenor, Appellee.

No. 95-1006

United States Court of Appeals,
First Circuit.

Aug. 9, 1995

* * *

Before SELYA, CYR, and STAHL, Circuit Judges.

PER CURIAM,

This case involves a dispute over the relative priority to be accorded to federal tax claims against an insolvent health maintenance organization. After an earlier opinion in which we held that the federal court had exclusive jurisdiction to hear and determine the competing claims, see Garcia v. Island Program Designer, Inc., 4 F.3d 57, 60 (1st Cir.1993), the district court rejected the position urged by appellant, Puerto Rico's Insurance Commissioner, and ruled that the tax claims asserted by the Internal Revenue Service (IRS) were entitled to priority

over the claims of unpaid health-care providers. See Garcia v. Island Program Designer, Inc., 875 F. Supp. 940, 944 (D.P.R.1994). The Insurance Commissioner then prosecuted the instant appeal.

We will not dawdle. The court below has written a careful, well-reasoned opinion, correctly applying the legal doctrines articulated by the Supreme Court in Department of Treasury v. Fabe, 113 S. Ct. 2202 (1993), and adequately exploring the interplay among the federal priority statute, 31 U.S.C. § 3713, the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and local law, particularly P.R. Laws Ann. tit. 26, § 1914. It is our preferred practice that when, as now, "a trial court has produced a first-rate work product, a reviewing tribunal should hesitate to wax longiloquent simply to hear its own words resonate." In re San Juan Dupont Plaza Hotel Fire Litig., 989 F.2d 36, 38 (1st Cir.1993). That wise adage is fully applicable here. Accordingly, we affirm the entry of summary judgment in the IRS's favor for substantially the reasons elucidated in the opinion below.

Withal, we add one flourish. In the district court, appellant essayed only a fleeting reference to the Chevron principle. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). On appeal, the Commissioner makes Chevron the centerpiece of his argument. This is both too late and too little.

In the first place, it is our settled rule that legal theories not developed in the trial court cannot be splendiforously unveiled on appeal. See Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir.1992). In the second place, the Chevron

principle does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988); accord United States v. 29 Cartons of * * * An Article of Food, 987 F.2d 33, 38 n.6 (1st Cir.1993). Consequently, it would be wholly inappropriate for us to defer, as appellant importunes, to what strikes us as nothing more than a position of convenience. In all events, to win our allegiance an administrative agency's statutory interpretation must "flow[ ] rationally from a permissible construction of the statute," Strickland v. Commissioner, Me. Dep't of Human Servs., 48 F.3d 12, 17 (1st Cir.1995), and cannot be " 'arbitrary, capricious, or manifestly contrary to the statute.' " id. at 18 (citation omitted). Appellant's interpretation of P.R. Laws Ann. tit. 26, § 1914 fails this test.

We need go no further. The judgment of the district court must be summarily affirmed. See 1st Cir. Loc. R. 27.1. Affirmed.

APPENDIX D — PETITION FOR ORDER COMPELLING ARBITRATION AND STAY DATED NOVEMBER 7, 1995

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DAVISTER CORPORATION,

Plaintiff/Petitioner,

vs.

UNITED REPUBLIC LIFE INSURANCE COMPANY, and UTAH INSURANCE COMMISSIONER, ROBERT E. WILCOX, LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,

Defendants/Respondents.

PETITION FOR ORDER COMPELLING ARBITRATION AND STAY

Appendix D

Petitioner, Davister Corporation, hereby alleges:

1. This Petition involves a dispute between citizens of different states. Petitioner Davister Corporation ("Davister") is a corporation incorporated in the State of Nevada with its principal place of business in the State of Texas. Respondent United Republic Life Insurance Company ("United Republic") was an insurance corporation incorporated in the State of Utah with its principal place of business in the State of Utah. Robert E. Wilcox is a citizen of the State of Utah. The amount in controversy exceeds $50,000.00. Jurisdiction is, therefore, proper under 28 U.S.C. § 1332.

2. As of December 23, 1992, Davister and United Republic entered into a written Agreement whereby United Republic agreed to purchase from Davister one hundred percent (100%) of the issued and outstanding capital stock of RG Acquisition corporation (RGA"). The principal assets of RGA were certain real property and improvements located in Waco, Texas, known as the "Chrysler Technology Building," and a lease between RGA, as lessor, and Chrysler Technologies Airborne Systems, Inc., as lessee. In consideration, United Republic agreed to issue to Davister 3,027,000 shares of United Republic's Series B Stock. A true and correct copy of the Agreement, less exhibits, is attached and incorporated as Exhibit "A".

3. In paragraph 8(b) of the Agreement attached as Exhibit "A", United Republic agreed to indemnify Davister for any damages it incurred or suffered resulting from or arising out of any misrepresentation, breach of warranty, or non-fulfillment of any agreement or covenant by United republic under the Agreement or any other document delivered by United Republic pursuant to the Agreement or from any misrepresentation or

omission from any certificates, schedule, statement, document, or instrument furnished to Davister pursuant thereto and from any actions incident to any of the foregoing or enforcement in paragraph 8(b).

4. Paragraph 8(f)(i) of the Agreement attached as Exhibit "A" hereto provides for arbitration in Salt Lake city, Utah, of all disputes under paragraph 8. Said paragraph provides:

> (f) *Arbitration*. (i) All disputes under this paragraph shall be settled by arbitration in Salt Lake City, Utah, before a single arbitrator pursuant to the rules of the American Arbitration Association. Arbitration may be commenced at any time by any party hereto giving written notice to each other party to a dispute that such dispute has been referred to arbitration under this paragraph 8. The arbitrator shall be selected by the joint agreement of Seller and Purchaser, but if they do not so agree within 20 days after the date of the notice referred to above, the selection shall be made pursuant to the rules from the panels of arbitrators maintained by such Association. Any award rendered by the arbitrator shall be conclusive and binding upon the parties hereto; provided, however, that any such award shall be accompanied by a written opinion of the arbitrator giving the reasons for the award. This provision for arbitration shall be specifically enforceable by the parties and the decision of the arbitrator in accordance herewith shall be final and binding and there shall be no right of appeal therefrom. Each party shall pay its own expenses of arbitration and the expenses of the arbitrator shall be equally shared;

provided; however, that if in the opinion of the arbitrator any claim for indemnification or any defense or objection thereto was unreasonable, the arbitrator may assess, as part of his award, all or any part of the arbitration expenses of the other party (including reasonable attorneys' fees) and of the arbitrator against the party raising such unreasonable claim, defense or objection; (ii) nothing contained in this paragraph 8(f) shall prevent the parties from settling any dispute by mutual agreement at any time;

5. A controversy has arisen out of this Agreement and comes within the terms of paragraph 8.

6. United Republic represented to Davister that it had taken all necessary steps to issue its Series B Stock and that it had full authority and authorization to issue its stock to Davister. The Insurance Commissioner through the Chief Examiner of the Utah Insurance Department thereafter notified United Republic that the foregoing transaction and other transactions must be reversed because United Republic had not obtained prior approval from the Insurance Department to issue surplus debentures or capital stock.

7. United Republic was subsequently placed in an agreed rehabilitation with the Insurance Commissioner, Robert E. Wilcox, appointed as the Rehabilitator in Civil No. 93-0905603, styled *In re United Republic Life Insurance Co.*, in the Third Judicial District Court of Salt Lake County, Utah.

8. When Wilcox refused to approve the issuance of United Republic's stock to Davister, Davister requested return of the

RGA stock and its assets for lack of consideration. Wilcox has refused to return RGA or its assets to Davister even though he has likewise refused to pay the compensation provided in the Agreement.

9. Respondents initiated a cause of action in the 101st Judicial District Court of Dallas County, Texas, Cause No. 94-03023-E, styled *United Republic Life Insurance Company, In Rehabilitation and Utah Insurance Commissioner, Robert E. Wilcox, Plaintiffs, v. Carmel Realty Services, Ltd., Grapat Group, Inc., and Tara Group, Inc.*, involving claims related to the Chrysler Technology Building. Davister Corporation sought to intervene on the grounds that the claims alleged by the Respondents actually belong to it because the Agreement attached hereto should be rescinded.

10. In the meantime, however, in Civil No. 930905603 CN (now consolidated with Civil No. 930905380 AA, styled *United Republic Life Insurance Co. v. Utah Department of Insurance*, the agreed rehabilitation of United Republic was converted into an involuntary liquidation and the Utah Insurance Commissioner, Robert E. Wilcox, his successor in office, and his appointed deputies were appointed Liquidator of United Republic. The Liquidator was directed to take possession of United Republic and its assets and administrator then under the supervision of the Court. The Utah Court further ordered that all actions and proceedings against United Republic and its separate accounts in Utah and elsewhere by stayed pursuant to Utah law.

11. Based upon the Utah Court's Order, Commission Wilcox obtained an indefinite stay of Davister's claims of rescission and its intervention in the lawsuit in Dallas County, Texas.

Appendix D

12. Subsequently, the other defendants in the Dallas County lawsuit filed claim against Davister, which would also be subject to the arbitration provisions.

13. On November 2, 1995, Petitioner requested the Respondents to proceed with the arbitration of said controversy in the manner provided for in the Agreement, but Respondents have failed to agree to the arbitration or the stay of the proceedings and have otherwise failed to abide by the Arbitration Agreement.

WHEREFORE, Petitioner prays for an order compelling arbitration of the controversy in accordance with the Agreement for an order staying Cause No. 94-03032-E in the 101st Judicial District Court of Dallas County, Texas, *Republic Life Insurance Company In Rehabilitation and Utah Insurance Commissioner, Robert E. Wilcox, Plaintiffs, v. Carmel Realty Services, Ltd., Grapat Group, Inc. and Tara Group, Inc.*, and Civil No. 930905603 CN (consolidated with Civil No. 930905380 AA), in the Third Judicial District Court of Salt Lake County, State of Utah, styled *United Republic Life Insurance Company, a Utah Domiciled Insurance Company v. Utah Department of Insurance, In re: United Republic Life Insurance Company*, and for such other and further relief as the court deems proper.

DATED this 7th day of November, 1995.

s/ Charles P. Sampson
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